Supreme Court, U.S.
FILED
991 732 APR 2 7 2000
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TARA DAVENPORT, et al.,
Petitioners,

v.

YOUNG MEN'S CHRISTIAN ASSOCIATION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES F. SIMERMEYER, ESQ. *
HARRY B. WALLACE, ESQ.
27 UNION SQUARE WEST
SUITE 501
NEW YORK, NY 10003
(212) 691-7070

Counsel for Petitioners

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

Did the District Court abuse its discretion by not staying the Respondents' motions for summary judgment until discovery was completed pursuant to Rule 56 of the Rules of Civil Procedure?

Is it appropriate as a matter of law, under 20 U.S.C. Sections 1681 (Title IX) to physically examine 10-12 year old Native American girls against their will at a public athletic event, without the consent of the parents and in the absence of formal procedures to handle challenges made by an opposing team?

Is the standard set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817(1973), appropriate to establish a *prima facie* case for racial discrimination pursuant to 42 U.S.C. Section 1981, 42 U.S.C. Section 2000 *et seq.*, when the facts show that eight (8) Oglala Sioux Indian girls, ages 10-12, member of a protected class, were subjected to racial epithets at a basketball tournament in Rapid City, South Dakota and the only team in the tournament forced to submit to a physical examination to determine gender, when the gender of only two (2) or three (30) of the girls on the basketball team were even brought into question?

Is the Loneman School exempt from the prohibition against race and sexual discrimination and the tort actions for false imprisonment and false arrest, based on misconduct which took place in Rapid City, South Dakota, 60 miles from the Pine Ridge Indian Reservation, merely on the grounds that the school is located on the reservation?

PARTIES TO THE PROCEEDING

PETITIONERS

TARA DAVENPORT, infant by her legal guardian and natural mother, Jean Belt and JEAN BELT, MARY AND ARLENE WEASEL BEAR, by their legal guardian and natural mother, Lucille Weasel Bear, and LUCILLE WEASEL BEAR, ALICIA BAD HEART BULL, by her legal guardian and natural mother, Olynn Bad Heart Bull and OLYNN BAD HEART BULL, NATASHA CUNY, infant by her legal guardian and natural mother, Brenda Cuny, and BRENDA CUNY, LATONIA LITTLE SPOTTED HORSE, by her legal guardian and natural mother, Irma Ten Fingers and IRMA TEN FINGERS, SARA TEN FINGERS infant, by her legal guardian and natural mother, Sheryl Her Many Horses, and SHERYL HER MANY HORSES, JESSE TEN FINGERS by her legal guardian and natural mother, Bernadine Ten Fingers, and BERNADINE TEN FINGERS, CARLY ESPINOZA, by her legal guardian and natural mother, Ina May Espinoza, and INA MAY ESPINOZA. Petitioners are individuals and have no corporate affiliations.

RESPONDENTS

YOUNG MEN'S CHRISTIAN ASSOCIATION, a/k/a YMCA, LONEMAN SCHOOL, CUSTER SCHOOL DISTRICT, PATRICK REYNOLDS, JOHN AND JANE DOE 1, JOHN AND JANE DOE 2, and JOHN AND JANE DOE 3.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT FOR GRANTING THE WRIT 4

ARGUMENT 1
The lower Court abused its discretion by granting the respondents' motion for summary judgment prior to the completion of discovery 5

ARGUMENT 2
The lower Court failed to follow the standard for racial discrimination set forth by this Court in McDonnell Corp. v. Green, 411 U.S. 792 . . . 8

ARGUMENT 3
The physical examination of eight infant girls to determine gender, against their will and without parental consent at a public athletic event is a violation of Title IX of the Civil Rights Act of 1964 as a matter of law 11

CONCLUSION 12

APPENDIX

Appendix A
Eighth Circuit Unpublished Opinion, and Judgment, 11/16/99 . . . . . 1a

Appendix B
District Court Memorandum Opinion and Order granting Defendants' Motions for Summary Judgment and Judgment, 10/29/98 . . . 7a

Appendix C
Eighth Circuit Order Denying Petition for Rehearing, 1/28/00 . . . . . 27a

TABLE OF AUTHORITIES AND CASES

CASES:

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 106 S. Ct. 2505
91 L. Ed. 2d 202 (1969) 7, 12

Celotex Corp. v. Catrett,
477 U.S. 317, 106 S. Ct. 2548,
(91 L. Ed. 2d 265 (1969) 7

Gesber v. Lago Vista Independent School District,
__ U.S.__, 118 S. Ct.
L. Ed. 2d 277 (1998) 12

Marvin Dale Palmer, Administrator of the
Estate of Johnnie Palmer Deceased
v. Tracor, Inc. 856 F. 2d 1131
1988 U.S. App. Lexis 1229 (8th Cir.) 6-7

McDonnell Douglas Corp. v. Green,
411 U.S. 792, 36 L. Ed. 2d 668, 93
S. Ct. 1817 (1973) . . . . . i, 4, 8, 9

Ott v. City of Champlin et. al.,
80 F. 3d 254, 1996 U. S.
App. Lexis 5805 (8th Cir.) 12

Thompson v. Board of Special Education District No. 1,
144 F. 3d 574, 580, (8th Cir. 1998) 9

FEDERAL STATUTES:

20 U.S.C. Section 1681 (Title IX) . . . . . i, 1, 8, 11

28 U.S.C. Section 2401, Federal Tort Claims Act 1

42 U. S. C. Section 1981 . . . . . i, 1, 8

42 U. S. C. Section 2000 *et seq* . . . . . i, 1, 8

OPINIONS BELOW

The decision and opinion of the United States Court of Appeals for the Ninth Circuit is unreported. A Copy of the denial of petition for rehearing was issued on January 28, 2000 and is included in the Appendix C at 27a. A copy of the Judgment affirming the District Court decision was issued on November 16, 1999 and is included in Appendix A at 5a. copy of the opinion of the Appeals Court was issued on November 16, 1999 and is located in Appendix A at 1a. The Judgment of the District Court for the Western District of South Dakota was issued on October 29, 1998 and is located at Appendix B 24a. The Opinion of the District Court for the Western District of South Dakota is unpublished and issued on October 29, 1998 and is included in Appendix B at 7a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its Opinion denying the Petition for a rehearing on January 28, 2000, (App. C at 27a). This petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sections 1254(1) and 2106.

STATUTORY PROVISIONS INVOLVED

20 U.S.C. Sections 1681 (Title IX).
42 U.S.C. Section 1981.
42 U.S.C. Section 2000 *et seq.*
28 U.S.C. Section 2401, Federal Tort Claims Act.

STATEMENT OF THE CASE

This case involves Native American Petitioners who reside on an Indian Reservation located in Oglala, South Dakota. The facts in this case are complex and due to the fact that the aggrieved parties are infants, essential facts and details of this matter are in the exclusive possession of the Respondents. The case arises from the infant Petitioners participation in an all-girls basketball tournament sponsored by Respondent YMCA and held in Rapid City, South Dakota. The infant girls represented Respondent Loneman School at the tournament. Hermosa School, part of the Respondent Custer School District, was also a team playing in the tournament. While participating in the tournament, the Petitioner infants were searched prior to being allowed to play the championship game, allegedly to determine the gender of each individual member of the team. Following the incident at the tournament, a meeting was held in Loneman School were the infant girls and their parents and guardians were confronted by the Respondents in an attempt to cover up and make light of the search conducted at the tournament. As a result of the aforementioned events, the Petitioners assert that their constitutionally protected rights were violated and they have brought an action for racial and gender discrimination and for violation of their personal rights in tort.

The case was commenced on December 2, 1997. An Answer, Counterclaim and Cross-claim was filed by Respondent, Custer School District on December 23, 1997. A motion to dismiss was made by Hermosa School District on December 23, 1997. An answer by the YMCA, Patrick Reynolds and John and Jane Doe 1 was filed on January 20, 1998. On January 23, 1998 the District Court filed and Order granting the motion of Hermosa School to be dismissed from

the case. Loneman School filed an answer on February 27, 1998. Loneman School filed an Answer to the Custer School District's Cross-Claim on June 15, 1998. An Answer to the Cross-Claim of Custer School District was filed by the YMCA on June 15, 1998. The District Court issued a Scheduling Order for discovery on June 23, 1998.

YMCA filed a motion for Summary Judgement on August 12, 1998.Loneman School filed a motion for Summary Judgement on August 31, 1998. Custer School filed a motion for Summary Judgement on September 18, 1998. Appellants filed Opposition to YMCA's and Loneman's motion for Summary Judgement of October 1, 1998. On October 7, 1998 YMCA filed a reply to Petitioners' Opposition papers. Loneman filed Reply to Petitioners' opposition papers on October 9, 1998. On October 13, 1998 the Petitioners filed an Answer to Custer's Counterclaim and Opposition to Custer's motion for Summary Judgement. Custer filed a Reply to Petitioners' Opposition papers on October 26, 1998.

On October 29, 1998 the Court rendered a Memorandum Opinion and Order on the three Summary Judgement Motions in favor of all three Respondents. Judgment was also filed by the Court on October 29, 1998. Notice of Appeal was filed by Petitioners on November 25, 1998. The Untied States Court of Appeals for the Eighth Circuit took the appeal on submission after denial for oral argument, and a decision was rendered on November 16, 1999, affirming the District Court's decision.

A petition for a re-hearing by the panel was denied on January 28, 2000.

ARGUMENT FOR GRANTING THE WRIT

The unpublished decision of the Court of Appeals is erroneous in affirming the lower Courts Judgment. The lower Courts failure to permit the petitioners to complete discovery was prejudicial and an abuse of the courts power. Pursuant to Rule 56, a summary judgment is granted after discovery. The failure to permit the infant Petitioners an opportunity to complete discovery in a case where the documentation and facts are in the exclusive control of the adult Respondents is erroneous. The Petitioners argument to the District Court that the Petitioners would be prejudiced unless they were allowed completion of discovery was in essence, a motion for a continuance to complete discovery and the lower courts failure to grant the continuance was a abuse of the Courts discretion.

The compelling reason for the granting of this Writ is that the Lower Courts failed to follow the rule of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973) and the relevant decisions of this court that followed in the recognized development of discrimination law. In addition, the behavior of performing physical examinations of infant children to determine gender in a public arena without the consent of parents is so egregious as to raise a novel question regarding the rules of acceptable behavior at athletic events when infants are involved. The Lower Courts findings that the Petitioners failed to meet the burden of *prima facie* case for gender and racial discrimination was misapprehended pursuant to the well established law of this Court.

ARGUMENT 1

The lower Court abused its discretion by granting the respondents' motion for summary judgment prior to the completion of discovery.

The Lower Court's decision granting summary Judgment in favor of Respondents was premature because discovery was not completed. The failure to permit discovery resulted in prejudice to Petitioners and consequently precluded the Petitioners from ascertaining sufficient data to preserve their action for racial and gender discrimination as well as the action under state tort law. The premature granting of summary judgement was erroneous.

Discovery was not completed prior to the Respondents motion for summary judgement. Petitioners were not permitted the opportunity to hold depositions of the parties and were limited to interrogatories and demands for inspection of documents. Due to the complex nature of racial and gender discrimination and personal right violations the decision to grant summary judgement should have been denied to permit Petitioners adequate time for discovery.

The Respondents in this case consist of infants who were 10 to 12 years of age at the time of the incidents. Although they were present during the tournament and search and subsequent meetings with the Respondents, as minors they were cognizant of all of the facts and relevant information as minors.

As students under the charge and control of the Loneman School and its staff, the children were relegated to follow orders and not privy to all of the conversations and

actions of the Respondents. The detailed facts that are essential to the proof of the Petitioners' case were kept from the Petitioner infants and their parents, who were not present at the time of the incident at the YMCA tournament. The facts of this case indicate that the Loneman players were kept in the lobby of the gym on December 2, 1995. That during the time they were at the lobby waiting, there were significant conversations between, Respondents. Prior to the team returning to the gym, one of the Respondent's agents approached the YMCA officials to complain at least three times. The substance of those conversations were not detailed. The affidavits of the Respondents are in conflict and raise material issues of fact that are crucial to the case. What transpired at the January 9 and 12, 1996 meetings are also unclear and referred to in vague terms and ripe for follow up in discovery or depositions of the parties with personal knowledge. Quite clearly, in preparation for the motion for Summary Judgement, the affidavits presented by the Respondents were presented in a light most favorable to granting the motion. These affidavits present only a foundation for deposition of Respondents by Petitioners. The information and facts available to supplement and clarify the issues of this case are in the control of the Respondents and only available to the Petitioners through discovery. The facts as presented by the parties are in conflict and beg clarification in order to determine the truth of the matter before the court.

The facts of this case clearly set forth that the infant Petitioners were students at Loneman and within the control of the Appellees, the infants should have been given an opportunity to complete discovery and hold depositions prior to granting a summary judgment.

This Court held in Marvin Dale Palmer, Administrator of the Estate of Johnnie Palmer, Deceased v. Tracor, Inc.,

856 F. 2d 1131, 1988 U. S. App. Lexis 12291(8th Cir), that the plaintiff be given an opportunity to conduct discovery. In the Palmer case Id. the plaintiff did not seek further discovery until the motion for summary judgement was decided. The Court held that the summary judgement dismissal was premature. In Palmer Id. The court cited Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1968) and made it clear that:

> "The plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgement. This is true even where the evidence is likely to be within the possession of the defendant, as long as plaintiff has had a full opportunity to conduct discovery (emphasis added)"

Clearly, in this case, Petitioners were not given a full opportunity to conduct discovery, no depositions were permitted prior to the decision granting summary judgment. The Court further elaborated citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2552-2553, 91 L. Ed. 2d 265 (1968), stating:

> "The Supreme Court has held that "Rule 56 (c) mandates the entry of summary judgement, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial(Emphasis added)".

Although the District Court's decision and memorandum discussed the Anderson and Celotex Id. cases, the essential

condition of adequate discovery was not properly and throughly considered, making the summary judgement ruling premature. The limited discovery had by Petitioners in this case, was necessary to complete depositions and clarification of the affidavits and statements made by Respondents.

The District Courts ruling acted to deny the Petitioners adequate and full discovery and was premature.

ARGUMENT 2

The lower Court failed to follow the standard for racial discrimination set forth by this Court in McDonnell Corp. v. Green, 411 U.S. 792.

The Lower Court erred in not applying the established standard in racial discrimination case under McDonnell Douglas, Corp. v. Green, 411 U.S. 792(1973).

The decision dismissing the Petitioners' action for Racial Discrimination was erroneous due to the fact that the allegations set forth were sufficient to raise genuine issues for a trier of fact and as a matter of law.

The claims of the Respondents are based on 20 U.S.C. Section 1681 (Title IX), 42 U.S.C. Section 1981 and 42 U.S.C. Section 2000 et seq.(Title VI) in that the infant girls on the Loneman School team were treated differently on December 2, 1995 and again with their parents and guardians on January 9 and 12 , 1996.

The issue of gender was used as a pretext to racial discrimination against the infants at the YMCA basketball

tournament by the YMCA officials, Loneman coach and Hermosa coach, players and fans. The search was clearly discrimination against the group of American Indian girls at the tournament in that the treatment was grossly different than anyone else would have been treated. No other players were questioned as to their gender and searched after defeating a non-Indian team and just prior to playing the championship game. The facts of the case and general knowledge do not permit the finding that there was no prejudicial treatment of these American Indian infants. The accounts rendered by the persons present are inconsistent. The YMCA and Hermosa accounts are in conflict as well as in conflict with the infant team members. The pleadings and the basic facts support the Petitioners' case for discrimination and disparate treatment based upon the decision to search the entire team. The standard cited by the District Court in Thompson v. Board of Special School District No.. 1, 144 F.3d 574, 580 (8th Cir. 1998) does not reflect the standards for *prima facie* case and the shifting of the burden to the party accused of discrimination as set forth set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed. 2d 668, 93 S. Ct. 1817 (1973). The *prima facie* standard in the McDonnell Douglas Id. case under Title VII has been applied to Title VI cases. That the standard of disparate treatment has been pleaded by the Loneman team, guardians and parents, a protected class, American Indians. The search alone is a act of different treatment. No other teams were subjected to the search and the search was protested by the Loneman team members. Loneman team was invited as a school team. The Indian coaches word that his players were female was not sufficient to end the matter when challenged by a white team and coach from Custer School District. Clearly, the questioning of the Loneman team, an Indian team from the Pine Ridge Reservation who defeated the Hermosa School of the Custer School district illustrates *prima facie* race

discrimination. The racial slurs prior to the search substantiate the racial discrimination claim and shift the burden to the Respondents.

The facts are undisputed that the entire Loneman team was subject to the search and not certain individual players. The entire team was subjected to the search although the objection made was that certain girls on the team may have been boys.

The racial codes used by the YMCA and Hermosa were described in terms like, aggressive boy play, the dress and haircuts and the use of their Oglala names were used as a pretext to treat the entire team unfairly. Loneman's coach assisted in the discrimination by allowing the search of the team. The Petitioners' *prima facie* case shifts the burden to YMCA, Custer and Loneman to present a justified reason for the search.

The disingenuous explanation of Respondents for the search is gender discrimination at the least. It is unreasonable to have the entire team of 8, 10 to 12 year old girls go into a locker room, over protest by the girls, to be physically inspected by strangers based on accusations against some of the players by a defeated team. The discrimination continued when the Respondents attempted to cover up and make light of the search on January 9 and 12, 1996. The Loneman school after conversations with the other appellees decides to meet with the children and parents and guardians to smooth over their bad acts without rendering treatment or accountability. The explanation was that the YMCA, Custer and Loneman wanted to apologize but never stated what they were apologizing for if that was their real motive.

The Court was obligated to view the facts of this case in total, the totality of each incident is tantamount to racial and gender discrimination. The separation of each issue of discrimination is erroneous and the acceptance of the factual accounts of the Respondents without a hearing is inappropriate and an abuse of discretion.

ARGUMENT 3

The physical examination of eight infant girls to determine gender, against their will and without parental consent at a public athletic event is a violation of Title IX of the Civil Rights Act of 1964 as a matter of law.

The Loneman infant basketball team, parents and guardians alleged gender discrimination in their complaint under Title IX of the Civil Rights Act of 1964 Section 1681 *et seq*. The complaint read in the most favorable light to the non moving party sets forth a *prima facie* case for gender discrimination. The gender bias occurred when accusations were made that some of the Loneman girls were in fact boys. The matter was reported to the Respondent YMCA director, Reynolds who demonstrated indifference to the discrimination and delegated decision making duties to on site staff. Reynolds made no attempt to follow up or go to the site to inspect such serious allegations. Reynolds was the tournament director, he knew of the incident from YMCA staff, Grieser and Thorstenson and was deliberately indifferent to the situation by allowing the site staff to search the girls from Loneman. Accordingly, the site person discriminated against the Loneman team by conducting the search. The Hermosa School of Custer School District was equally discriminatory by making the allegations which were without basis and the

proximate cause for the search. The Loneman Coach Scott Ten Fingers was also discriminatory to the Loneman girls by directing them to be searched to determine their gender, knowing they were all females. The facts of this case based upon a favorable reading on behalf of Petitioners' meet the elements set forth in Gesber v. Lago Vista Independent School District, __ U.S.___, 118 S. Ct. 1989, 141 L. ed. 2d 277 (1998).

The Court must put the facts in the light most favorable to the non moving party when considering a summary judgement motion. Id. Anderson. The standard of a search is analogous to Ott v.City of Champlin et al, 80 F. 3d 254, 1996 U. S. App. Lexis 5805. The Court in the Ott case found that the woman arrested had requested her shirt be pulled down and the statement by the police officer that "we are all women here" in addition to not pulling the shirt down was sufficient to defeat a summary judgement motion and send the issues to a jury. The treatment was so different from what could be expected gave rise to an inference of gender discrimination.

CONCLUSION

The Court of Appeals affirmation of the District Court's decision is not consistent with Rule 56 and the Summary judgment should not have been granted without the Petitioners right to complete discovery.

The failure of the Appeals Court to find that the Petitioners met their burden of showing a *prima facie* case of racial and gender discrimination should be reversed.

The Appeals Court finding that the Loneman school is immune under the FTCA is also erroneous and should be reversed.

Dated : April 27, 2000

/s/_____

James F. Simermeyer
Law Offices of James F. Simermeyer
Attorneys for Petitioners
27 Union Square West
Suite 501
New York, New York 10003
Tel.212-691-7070

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[UNPUBLISHED]

[Filed November 16, 1999]

No. 9-1037

Tara Davenport, by her legal guardian and natural mother, Jean Belt, et al., *Plaintiffs - Appellants*,	)
v.	)
Young Men's Christian Association, et al., *Defendants - Appellees*.	)

Appeal from the United States District Court for the District of South Dakota

Submitted: October 22, 1999
Filed: November 16, 1999

OPINION

Before WOLLMAN, Chief Judge, ROSS and LOKEN, Circuit Judges.

PER CURIAM.

In December 1995, plaintiffs participated in a YMCA-sponsored tournament in Rapid City, South Dakota, as members of the Loneman School's girls' basketball team. The Loneman School team won its semi-final game against the Hermosa School. When the Loneman team and its coach returned to the gym for the championship game, two YMCA volunteers advised them of a complaint by the Hermosa School coach that the Loneman team included boys. To resolve this novel dispute, the female YMCA volunteer and a female chaperone for the Loneman team took the Loneman players, who were all ten to twelve-year-old Native American girls, into a restroom where the girls demonstrated that each was in fact a female. The Loneman team then played in the championship game, and the tourney ended.

Two years later, the mothers of the Loneman School players, acting on their own behalf and as the girls' legal guardians, commenced this action against the Loneman School, the Custer School District (where the Hermosa School is located), and the YMCA and its tournament director. Plaintiffs alleged that the wrongful conduct of defendants during and after this incident made the girls feel depressed, humiliated, and embarrassed. Count 1 of the complaint asserted claims of invasion of privacy, intentional infliction of mental distress, mental anguish, unlawful imprisonment, and false arrest. Count 2 sounded in negligence. Count 3 alleged

unlawful race, sex, and age discrimination in violation of federal law.

The district court[1] granted defendants summary judgment and dismissed plaintiffs' federal law claims, concluding that plaintiffs had failed to come forward with evidence tending to prove that the conduct of any defendant was motivated by race, sex, or age discrimination. The court granted summary judgment dismissing with prejudice all state law claims against the Loneman School on the ground that plaintiffs' exclusive remedy is under the Federal Tort Claims Act because the Loneman School is operated by the Oglala Sioux Tribe pursuant to a grant from the Bureau of Indian Affairs and is therefore deemed to be part of the BIA for FTCA purposes. See generally Big Owl v. United States, 961 F. Supp. 1304, 1307-08 (D.S.D. 1997). Finally, the court declined to exercise supplementental jurisdiction over plaintiffs' state law claims against the other defendants and dismissed those claims without prejudice.

Plaintiffs appeal all of these rulings except the dismissal of their age discrimination claims. Plaintiffs first argue that the district court erred in granting summary judgment before discovery was complete. This claim is without merit because plaintiffs fail to show that they sought a continuance from the district court to complete additional discovery that was necessary for a proper determination of the summary judgment motions. See Fed. R. Civ. P. 56(f);

---

[1] The HONORABLE RICHARD H. BATTEY, then Chief Judge now a Senior Judge of the United States District Court for the District of South Dakota.

Dulany v. Camahan, 132 F.3d 1234, 1238-39 (8th Cir. 1997). Regarding plaintiffs' tort claims against the Loneman School, we agree with the district court that the FTCA applies, but we have some doubt whether the FTCA forecloses plaintiffs' claims for unlawful imprisonment and false arrest. See 28 U.S.C. § 2680(h). However, even if these claims are outside the FTCA, we conclude that summary judgment dismissing them on the merits was appropriate. See Blitz v. Boog. 328 F.2d 596,600 (2d Cir.) cert. denied. 379 U.S. 855 (1964). With regard to all other issues raised by plaintiffs on appeal, we affirm for the reasons stated by the district court in its Memorandum Opinion and Order dated October 29, 1998. See 8th Cir. R. 47B.

The judgment of the district court is affirmed. Plaintiffs' motion to supplement the record on appeal is denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Dated November 16, 1999]

No. 99-1037SDRC

Tara Davenport, infant, by her legal guardian and natural mother Jean Belt, et al., *Appellants*,	)
v.	)
Young Men's Christian Association, also known as YMCA; Loneman School; Custer School District; Patrick Reynolds; John and Jane Doe 1; John and Jane Doe 2; John and Jane Doe 3, *Appellees.*	)

Appeal from the United States
District Court for the District of South Dakota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

Plaintiffs' motion to supplement the record on appeal is denied.

(5172-010199)

November 16, 1999

A true copy.

Attest: /s/_____
Michael E. Gans
Clerk, U.S. Court of Appeals
Eighth Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

[Dated October 29, 1998]

No. CIV. 97-5104

TARA DAVENPORT, infant, by her legal guardian and natural mother, Jean Belt, and JEAN BELT, MARY AND ARLENE WEASEL BEAR, by their legal guardian and natural mother, Lucille Weasel Bear, and LUCILLE WEASEL BEAR, ALICIA BAD HEART BULL, by her legal guardian and natural mother, Olynn Bad Heart Bull and OLYNN BAD HEART BULL, NATASHA CUNY, infant, by her legal guardian and natural mother, Brenda Cuny, and BRENDA CUNY, LATONIA LITTLE SPOTTED HORSE, by her legal guardian and natural mother, Irma Ten Fingers and IRMA TEN FINGERS, SARA TEN FINGERS, infant, by her legal guardian and natural mother)

Sheryl Her Many Horses, and)
SHERYL HER MANY HORSES,)
JESSIE TEN FINGERS, by her)
legal guardian and natural mother,)
Bernadine Ten Fingers, and)
BERNADINE TEN FINGERS,)
CARLY ESPINOZA, by her legal)
guardian and natural mother, Ina)
May Espinoza, and INA MAY)
ESPINOZA,)
Plaintiffs,)
)
v.)
)
YOUNG MEN'S CHRISTIAN)
ASSOCIATION, a/k/a YMCA,)
LONEMAN SCHOOL, CUSTER)
SCHOOL DISTRICT, PATRICK)
REYNOLDS, JOHN AND)
JANE DOE I, JOHN AND JANE)
DOE 2, and JOHN AND)
JANE DOE 3,)
Defendants.)
)

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

PROCEDURAL HISTORY

On December 2, 1997, plaintiffs, 10- to 12-year-old players on an all-female basketball team and their parents,

filed a complaint against defendants stemming from conduct occurring at a YMCA basketball tournament in December 1995. Plaintiffs allege multiple state law tort violations as well as federal claims. The federal claims are brought under 20 U.S.C. § 1681 (Title IX), 42 U.S.C.§ 1981 (intentional race discrimination), 42 U.S.C. § 2000d et seq. (Title VI), and 29 U.S.C.§§ 621 et seq. (age discrimination). Pending before the Court are motions for summary judgment filed by Custer School District (Custer), Loneman School (Loneman), the Rapid City YMCA (YMCA), and Patrick Reynolds (Reynolds).

SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if the movant can "show that there is no genuine issue as to any material fact and that [the movant] is entitled to judgment as a matter of law." In determining whether summary judgment should issue, the facts and inferences from those facts are viewed in the light most favorable to the nonmoving party, and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356-57, 89 L. Ed. 2d 538 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in the pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists.

In determining whether a genuine issue of material fact exists, the Court views the evidence presented based upon which party has the burden of proof under the underlying substantive law. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). The Supreme Court has instructed that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy, and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986). The nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts," and "[w]here the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita. 106 S. Ct. at 1356.

The teaching of Matsushita was further articulated by the Supreme Court in Eastman Kodak Co. v. Image Technical Services. Inc., 504 U.S. 451, 468, 112 S. Ct. 2072, 2083, 119 L. Ed. 2d 265 (1992) where the Court said, "Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." The Court expounded on this notion by reiterating its conclusion in Anderson that, "[s]ummary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Eastman Kodak, 504 U.S. at 468 n.14, 112 S. Ct. at 2083 n.14 (quoting Anderson, 477 U.S. at 248, 106 S. Ct. at 2510). Finally, should there remain any doubt as to whether the courts continue to harbor any antagonistic feeling toward resolution of summary judgment

motions. Chief Judge Arnold in City of Mt. Pleasant. Iowa v. Associated Elec. Co-op., 838 F.2d 268 (8th Cir. 1988), laid such thoughts to rest. He stated that,

> [A] trilogy of recent Supreme Court opinions demonstrates that we should be somewhat more hospitable to summary judgment than in the past. The motion for summary judgment can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those cases that really do raise genuine issues of material fact.

Id., at 273. See also Midwest Radio Co. v. Forum Pub. Co., 942 F.2d 1294, 1296 (8th Cir. 1991).

Based on the foregoing, the trilogy of Celotex, Anderson, and Matsushita provides the Court with a methodology in analyzing defendants' motions for summary judgment. See generally I Steven A. Childress & Martha S. Davis, Federal Standards of Review § 5.04 (2d ed. 1991) (discussing the standards for granting summary judgment that have emerged from Matsushita, Celotex, and Anderson).[1]

---

[1] The trilogy of Celotex, Anderson, and Matsushita has redefined the standard for summary judgment previously annunciated in Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608,26 L. Ed. 2d 142 (1970) and Poller v. Columbia Broadcasting Svs., Inc., 368 U.S. 464, 467, 82 S. Ct. 486,7 L. Ed. 2d 458, 488 (1962). Poller and Adickes run counter to the teachings of Celotex, Anderson, and Matsushita which take

Under this trilogy, it is incumbent upon the nonmoving parties, based upon the showing set forth by defendants as the moving parties, to establish significant probative evidence to prevent summary judgment. See Terry A. Lambert Plumbing, Inc. v. Western Sec. Bank, 934 F.2d 976, 979 (8th Cir. 1991). Plaintiffs have been unable to sustain their burden in the face of defendants' showing.

FACTS

The undisputed facts establish that on December 2, 1995, a basketball team representing Loneman School comprised of 10- to 12-year-old girls participated in a YMCA invitational girls' basketball tournament in Rapid City. Plaintiffs' Undisputed Material Facts ("UMF") at 2-3. Loneman is located on the Pine Ridge Indian Reservation and is "operated by the Oglala Sioux Tribe pursuant to a grant from the Bureau of Indian Affairs." Affidavit of Gerald Roy. All team members are Indians. Plaintiffs' UMF at 2-3. On December 2, 1995, in the first round of the tournament, the Loneman team beat a team from Hermosa. Hermosa is a school within the Custer School District.

After the first game several of the parents from the Hermosa team as well as the coach, Jennifer Neugebauer

---

issue with the concept that summary judgment is to be used sparingly. See generally William W. Schwarzer, Alan Hirsch, and David J. Barrans, The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure. Federal Judicial Center, at 4 (1991).

(Neugebauer), suspected that some of the Loneman players were in fact boys. Ouster's UMF at 4. They brought this to the attention of Eric Thorstenson (Thorstenson), the site referee, and Linda Grieser (Grieser), the site supervisor. YMCA's UMF at 3-4. Both Thorstenson and Grieser were YMCA volunteers. Id. at 3. When the Loneman team returned to the gym for the championship game, Thorstenson and Grieser approached them and their coach, Scott Ten Fingers, and expressed concern that the Loneman team was playing boys. Id. at 6.

The girls were taken to the rest room where some girls showed their bra straps and others who did not wear bras showed the tops of their panties to confirm that they were indeed females. Plaintiffs' UMF at 5. Plaintiffs allege that several players also opened or lifted up their jerseys to prove they were not boys. Id. Force was not used, but was unnecessary since the players themselves wanted to resolve the issue. Sara Ten Fingers noted that "some of the girls did not wear bras and panties and opened their jersey tops and trunks for inspection." Affidavit of Sara Ten Fingers at I, Plaintiffs' exhibit F. No further action was taken.[2]

---

[2] On January 9, 1996, Neugebauer and Paul Anderson, the athletic director of the Custer School District, were asked to attend a meeting at the Loneman School. Ouster's UMF at 4; Affidavit of Neugebauer at 3. At the meeting, which was attended by the Loneman team and their parents, both Neugebauer and Anderson apologized for their conduct. Id.

On January 12, 1996, after extended communication between the YMCA and Loneman officials, a meeting was held in the Loneman School for representatives of the YMCA to apologize

DISCUSSION

Plaintiffs allege that the defendants are liable for the conduct occurring on December 2, 1995, as well as for actions surrounding the meetings on January 9 and 12 and the healing ceremony. See footnote 2. Complaint at 6-8.

A. YMCA, Patrick Reynolds, John and Jane Doe

1. Age discrimination

In count three of the complaint entitled "Discrimination Based on Sex, Age and Race," plaintiffs allege that the inspection of the girls, all of whom were 10 to 12 years old, was "devised to discriminate against minor children." Complaint at 7. The only other reference to age discrimination is in the final paragraph of count three where plaintiffs summarize as follows: "The strip search of the plaintiff infants by the defendants resulted in the discrimination of the plaintiffs due to their race, age and gender in violation of the federal laws, Equal Protection under

---

for the incident on December 2. Plaintiffs' UMF at 5. Attending the meeting were Roger Gallimore (Gallimore), the executive director of the Rapid City YMCA, Reynolds, the director of the basketball tournament, Mike Long, and Dana Nachtigal. Id. Several administrators from Loneman including Scott Ten Fingers, the team's coach, were present at this meeting as well as the Loneman players and their parents. Id. That same evening a healing ceremony was held to assist the plaintiffs in overcoming the December 2, 1995, incident.

the Constitution of the United States." Plaintiffs did not respond to the YMCA and Reynold's motion for summary judgment on the age discrimination issue although they did address the racial and gender discrimination issues.

Plaintiffs base their age discrimination claim on a misreading of 29 U.S.C. § 621-634, known as the Age Discrimination in Employment Act (ADEA). As the title of the act indicates, the ADEA concerns age discrimination in the employment context. 29 U.S.C. § 621(a). There is no indication that the girls or their parents were somehow employees of the YMCA. Second, the ADEA was designed to prevent discrimination based on age for individuals over forty years old as indicated by 29 U.S.C. § 621(b) which outlines the purpose of the act: "to promote employment of older persons based on their ability rather than age." Although some of the parent plaintiffs may be over forty, there is no evidence that age was at all a factor in any harm they may have received. Finally, there is simply no scenario of events in this case which warrants an age discrimination claim. Plaintiffs do not demonstrate that they would have been treated differently but for their age. The ADEA by its clear definition is not implicated here.

2. Racial discrimination

Plaintiffs contend that they were singled out and treated differently by the YMCA, Reynolds, Thorstenson, and Grieser because they are Indian. Complaint at 6. They further argue that the discrimination occurred during the basketball tournament as well as the meeting and healing ceremony taking place on January 12, 1996. Id. The complaint does not indicate under what federal law plaintiffs

make this assertion. Plaintiffs fail to establish the YMCA as a state actor and are thus precluded from showing a constitutional-based claim.

In order to establish a prima facie claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., plaintiffs must establish that the entity accused is the recipient of federal funds, that they were discriminated against, and that "race, color, or national origin was the motive for the discriminatory conduct." Thompson v. Board of Special School District No. 1, 144 F.3d 574, 580 (8th Cir. 1998). Even assuming that the YMCA receives federal funds for the basketball tournaments it organizes, plaintiffs have failed to demonstrate that they were discriminated against on the basis of race. Plaintiffs assert that since they were an all-Indian team, the treatment they received on December 2, 1995, was due to their race. Likewise under 42 U.S.C. § 1981, there must be a showing that plaintiffs were treated differently due to their race. The evidence does not support such assertions.

Black's Law Dictionary defines discrimination as "[a] failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored." Black's Law Dictionary, Special Deluxe Fifth Edition (1979) (citing Baker v. California Land Title Co., 349 F. Supp. 235, 238-39 (C.D. Cal. 1972). This definition presupposes unequal treatment. The Loneman players were not treated any differently than another team in similar circumstances. In other words, there is no evidence suggesting that another team, similarly accused of playing males, would have been treated differently. So at the initial stage it is not clear that the Loneman team was

"discriminated" against. Certainly they were treated with a lack of sensitivity and most inappropriately.

3. Gender discrimination

As mentioned above, plaintiffs' constitutional, or constitutional-based, claims of gender discrimination fail for lack of state action. This leaves plaintiffs with a claim for gender discrimination under Title IX of the Civil Rights Act of 1964, 20 U.S.C. § 1681 et seq.[3] To support their claim of sexual discrimination under Title IX, plaintiffs make several assumptions which are not supported by the facts. They first claim that the conduct in question constitutes "sexual" harassment. Second, they claim that the elements for showing a Title IX violation are all present.

Even assuming the treatment of the Loneman team could be construed as sexual discrimination, plaintiffs fail to meet the required elements of a Title IX claim as outlined by the Supreme Court in Gebser v. Lago Vista Independent School District., __ U.S. ___, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998). In Gebser, the Court held that in cases

---

[3] 20 U.S.C. § 1681(a) reads in pertinent part as follows:

> **(a) Prohibition against discrimination; exceptions**
> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

involving sexual discrimination where an entity, a school district in that case, is being sued for the actions of one of its employees, the entity will not be held liable unless: (1) an official who has the authority to remedy the alleged discriminatory action; (2) has actual knowledge of the discrimination; and (3) is deliberately indifferent to the conduct. 118 S. Ct. at 1999. Principles of respondeat superior do not apply. Id. at 1997. Using this standard, the Court finds that neither the YMCA nor Patrick Reynolds discriminated against the Loneman team on the basis of sex

B. Custer School District

Plaintiffs make the same accusations of sexual, racial, and age discrimination based upon federal law against Custer. Complaint at 7. Similarly, plaintiffs base their claims against Custer on both the December 2, 1995, incident and a meeting in January 1996.[4] The Court finds no merit in these claims.

Plaintiffs fail to indicate any affirmative conduct by Custer officials which provides a basis for an age discrimination claim under the Constitution. Thus, plaintiffs' age discrimination claim against Custer fails for two reasons: (1) there is no federal law applicable in this instance and (2) the facts do not support such a claim.

---

[4] Custer filed a counterclaim for barratry against plaintiffs and cross-claims against their codefendants. Custer has agreed to withdraw the cross-claims if its motion for summary judgment is granted. Ouster's Brief in Support of Motion for Summary Judgment at 13 n.3.

In their brief in response to Ouster's motion for summary judgment, plaintiffs contend that Custer should be held liable for instigating the chain of events which led to the inspection of the Loneman players, for racial epithets directed at the Loneman players, and for conduct at a meeting in January 1996. Plaintiffs' Brief in Response to Ouster's Motion for Summary Judgment (Response to Ouster's Motion) at 10-14. Such an allegation is specious at best. They do not allege that any Custer official conducted the inspection and in fact concede that the Hermosa coach, Neugebauer, could not have participated in the search since her team was playing as it transpired. Id. at 12. Since Neugebauer was the only Custer official attending the tournament in an authorized position, plaintiffs' claims against Custer are based on her conduct as an agent or employee of Custer.

As for the racial epithets by the spectators, plaintiffs have not demonstrated that Neugebauer made any racially demeaning statements to the Loneman players, coach, or fans. In her affidavit Sarah Ten Fingers noted that the racial slurs came from the Hermosa players and fans. Affidavit of-Sarah Ten Fingers at I. Unfortunately, lack of civility occurs far too often at sporting events. The conduct of a few fans does not provide a basis for liability for the school district nor do the verbal statements made by Hermosa players.

The sole basis for alleging sex discrimination against Custer is the complaint made by Neugebauer that some of the Loneman players were boys. There is no accusation by plaintiffs that Neugebauer or any other Custer official participated in the physical inspection of the Loneman players. As previously mentioned, plaintiffs concede that

Neugebauer was coaching at the time the inspection took place and could not have participated in the inspection. Response to Ouster's Motion at 12. Therefore, there is no factual basis for a sex discrimination claim against Custer.

C. Loneman School

As with the other defendants, plaintiffs originally claimed that Loneman officials discriminated against them based upon age, race, and gender. Complaint at 7. There was no mention of the age discrimination claim in plaintiffs' response to Loneman's motion for summary judgment. Given this fact and the discussion of the age discrimination claims made against the YMCA and Custer, it is apparent that there is no basis for an age discrimination claim in this case. Accordingly, the Court need not consider the issue further.

D. State law claims

In addition to the many federal law claims, plaintiffs have alleged various state law claims such as intentional infliction of emotional distress, mental anguish, unlawful imprisonment, and negligence. Complaint at 5-6. The YMCA, Patrick Reynolds, and Custer request that the Court not exercise its discretion to extend jurisdiction to the state claims. Loneman contends that since it is a Bureau of Indian Affairs (BIA) school, a tort suit against it must be filed against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. which preempts state court jurisdiction. Loneman's Reply at 5. No such claim has been filed. In such a case, this Court has no jurisdiction over an FTCA claim until administrative remedies have been pursued.

Having concluded that there is no merit to plaintiffs' federal claims, the question becomes whether the remaining state law based claims should be entertained by this Court. 28 U.S.C. § 1367 outlines those instances when a district court can maintain supplemental jurisdiction over such claims. 28 U.S.C. § 1367(c)(3) permits a district court to refuse supplemental jurisdiction over state law claims if "the district court has dismissed all claims over which it has original jurisdiction." The decision to maintain jurisdiction over state claims once all federal claims have been dismissed is discretionary. Franklin v. Zain, 152 F.3d 783, 786 (8* Cir. 1998).

When considering whether to exercise supplemental jurisdiction over state claims a court should consider such factors as judicial economy, fairness to litigants, and convenience. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). Moreover, "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties by procuring for them a surer-footed reading of applicable law." Id. None of these factors support maintaining federal jurisdiction. Therefore, the Court declines to exercise jurisdiction over the remaining state court claims against the YMCA, Patrick Reynolds, and Custer. The Court notes that dismissal of these claims is without prejudice. Unless South Dakota law provides a longer tolling period, plaintiffs' state law claims against these defendants are tolled for 30 days following this date pursuant to 28 U.S.C. § 1367(d). Franklin, 152 F.3d at 786; Edmondson & Gallagher v. Alban Towers Tenants Assoc., 48 F.3d 1260, 1267 (D.C. Cir. 1995).

At the conclusion of its brief in support of the motion for summary judgment, Custer indicated that if there were a favorable disposition of the motion it would withdraw the cross-claims filed against the co-defendants. Given that the motion for summary judgment has been granted, cross-claims are therefore also dismissed upon request of the cross-claimant.

Custer also filed a counterclaim against plaintiffs for barratry. Having thoroughly reviewed the record, the Court concludes that the counterclaim is without merit and dismisses it.

CONCLUSION

Accordingly, it is hereby

ORDERED that the YMCA and Patrick Reynolds' motion for summary judgment (Docket #46) is granted. Those claims allegedly based upon federal law are dismissed with prejudice. Plaintiffs' state law claims are dismissed without prejudice.

IT IS FURTHER ORDERED that Custer School District's motion for summary judgment (Docket #59) is granted. All federal claims against Custer are dismissed with prejudice, whereas the state law claims are dismissed without prejudice.

IT IS FURTHER ORDERED that Loneman School's motion for summary judgment (Docket #51) is granted. All claims against Loneman shall be dismissed with prejudice.

IT IS FURTHER ORDERED that Ouster's counterclaim for barratry is dismissed. Ouster's cross-claim is dismissed without prejudice.

Dated October 29, 1998.

BY THE COURT:

/s/_____
RICHARD H. BATTEY
CHIEF JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

[Dated October 29, 1998]

No. CIV. 97-5104

TARA DAVENPORT, infant,	)
by her legal guardian and natural	)
mother, Jean Belt, and JEAN	)
BELT, MARY AND ARLENE	)
WEASEL BEAR, by their legal	)
guardian and natural mother,	)
Lucille Weasel Bear, and	)
LUCILLE WEASEL BEAR	)
ALICIA BAD HEART BULL,	)
by her legal guardian and natural	)
mother, Olynn Bad Heart Bull and	)
OLYNN BAD HEART BULL,	)
NATASHA CUNY, infant, by	)
her legal guardian and natural	)
mother, Brenda Cuny, and	)
BRENDA CUNY, LATONIA	)
LITTLE SPOTTED HORSE, by	)
her legal guardian and natural	)
mother, Irma Ten Fingers and	)
IRMA TEN FINGERS, SARA	)
TEN FINGERS, infant, by her	)
legal guardian and natural mother	)
Sheryl Her Many Horses, and	)
SHERYL HER MANY HORSES,	)
JESSIE TEN FINGERS, by her	)

legal guardian and natural mother, Bernadine Ten Fingers, and BERNADINE TEN FINGERS, CARLY ESPINOZA, by her legal guardian and natural mother, Ina May Espinoza, and INA MAY ESPINOZA, *Plaintiffs*,	)
v.	)
YOUNG MEN'S CHRISTIAN ASSOCIATION, a/k/a YMCA, LONEMAN SCHOOL, CUSTER SCHOOL DISTRICT, PATRICK REYNOLDS, JOHN AND JANE DOE I, JOHN AND JANE DOE 2, and JOHN AND JANE DOE 3, *Defendants*.	)

JUDGMENT

Based upon this Court's memorandum opinion and order issued this same day, it is hereby

ORDERED that judgment shall issue in favor of the YMCA and Patrick Reynolds. Plaintiffs' federal law based claims shall be dismissed with prejudice. Plaintiffs' state law claims shall be dismissed without prejudice.

IT IS FURTHER ORDERED that judgment shall issue in favor of Custer School District. Plaintiffs' federal law based claims against Custer shall be dismissed with prejudice. Plaintiffs' state law claims shall be dismissed without prejudice.

IT IS FURTHER ORDERED that judgment shall issue in favor of Loneman School. All of plaintiffs' claims shall be dismissed with prejudice. Dated this 29th day of October, 1998.

BY THE COURT:

/s/_____
RICHARD H. BATTEY
CHIEF JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Dated January 28, 2000]

No. 99-1037SDRC

Tara Davenport, et al.,	)
Appellants,	)
	)
v.	)
	)
YMCA, et al.,	)
Appellees.	)
	)

Order Denying Petition for Rehearing

The petition for rehearing by the panel is denied.

(5128-010199)

January 28, 2000

Order Entered at the Direction of the Court:

/s/_____
Michael E. Gans
Clerk, U.S. Court of Appeals
Eighth Circuit

(2)

Supreme Court, U.S.
FILED
MAY 31 2000
CLERK

No. 99-1732

IN THE
SUPREME COURT OF THE UNITED STATES

TARA DAVENPORT, et al.,
Petitioners.

v.

YOUNG MEN'S CHRISTIAN ASSOCIATION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT CUSTER SCHOOL DISTRICT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TIESZEN LAW OFFICE, LLP
For the Firm
Thomas H. Harmon*
Richard P. Tieszen
Karla L. Engle
306 East Capitol, Suite 300
P.O. Box 550
Pierre, South Dakota 57501
(605) 224-1500

Counsel for Respondent
Custer School District

*Counsel of Record

17 pp

QUESTIONS PRESENTED

Have Petitioners properly invoked the jurisdiction of this Court given that their Petition for Rehearing in the Eighth Circuit was untimely?

Did the District Court appropriately refuse to stay Respondents' Motion for Summary Judgment where Petitioners did not seek a continuance from the District Court to complete additional discovery pursuant to FedRCivP 56(f)?

Can an action under 20 USC § 1681 (Title IX) be maintained against Respondent Custer School District, which did not conduct or participate in any demonstration by 10-12 year old participants in an all-female basketball tournament, designed to establish that the participants were, in fact, females?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

PERCEIVED MISSTATEMENTS OF FACT IN THE PETITION PURSUANT TO SUPREME COURT RULE 15(2) 1

JURISDICTION 3

SUMMARY OF ARGUMENTS 6

ARGUMENT I 7

A PARTY FACED WITH A MOTION FOR SUMMARY JUDGMENT MUST MAKE SOME SHOWING THAT ADDITIONAL DISCOVERY IS NECESSARY IN ORDER FOR THE PARTY TO DEVELOP FACTS TO SUPPORT THAT PARTY'S OPPOSITION TO THE MOTION

ARGUMENT II 9

THE LOWER COURT PROPERLY DISMISSED RESPONDENT CUSTER SCHOOL DISTRICT WHERE THERE WAS NO SHOWING THAT ANY PERSON IN A POSITION OF AUTHORITY TOOK ANY ACTION OR INSTITUTED ANY POLICY IMPOSING SEX OR RACIAL DISCRIMINATION.

CONCLUSION 10

APPENDIX

TABLE OF AUTHORITIES

CASES

Anderson v. Liberty Lobby, Inc., 477 US 242, 106 SCt 2505, 91 LEd2d 202 (1986) 7

Cilotex Corp. v. Catrett, 477 US 317, 106 SCt 2548, 91 LE2d 265 (1986) 7

Gebser v. Lago Vista Indep. School Dist., 524 US 274, 118 SCt 1989, 141 LEd2d 277 (1998) 9

Matsushita Elec. Industry Co. v. Zenith Radio Corp., 475 US 574, 106 SCt 1348, 89 LEd2d 538 (1986) 7, 8

Young v. Harper, 520 US 143, 117 SCt 1148, 137 LEd2d 270 (1997) 4

STATUTES

FedRCivP 56(f) 6, 7

Supreme Court Rule 13(3) 4

Supreme Court Rule 15(2) 1

20 USC § 1681 (Title IX) 2, 9

PERCEIVED MISSTATEMENTS OF FACT IN THE PETITION PURSUANT TO SUPREME COURT RULE 15(2)

A principal purpose for filing of this brief in opposition is to satisfy Respondents' obligation to point out perceived misstatements made in the Petition.

A grievous misstatement is found on page 4 of the Petition for Writ of Certiorari in the following sentence: "In addition, the behavior of performing physical examinations of infant children to determine gender in a public arena without the consent of parents is so egregious as to raise a novel question regarding the rules of acceptable behavior at athletic events when infants are involved." Petition for Writ of Certiorari, p. 4. The use of the phrase "public arena" in this sentence casts an entirely unfair and unsupported light upon the events that occurred at the YMCA all-girls invitational basketball tournament in Rapid City, South Dakota. As noted by the Eighth Circuit Court of Appeals, once a question regarding the gender of the players on the Loneman team had been raised, a female YMCA volunteer and a female chaperon traveling with the Loneman team went with the girls into a ladies' restroom, where each demonstrated that they were, in fact, females. According to the team's female chaperon and the Petitioners' own statements of undisputed material facts, this was done through the girls displaying bra straps and panty tops and, for girls not wearing either, the girls opened jersey tops and trunks for inspection. District Court Memorandum Opinion and Judgment (Petition for Writ of Certiorari, Appendix A, p. 13a.) The characterization placed on this situation by

Petitioners is intended to inflame the sensibilities of the Court, and is not an accurate reflection of the record nor the Complaint filed by Petitioners in the District Court for South Dakota.

On page i of the Petition, under the heading "QUESTIONS PRESENTED," it is stated that the investigation of the girls as to gender was "against their will." In the third paragraph of the same page, it is stated that the Petitioners were "forced to submit to a physical examination to determine gender." In the heading of Argument 3 in Petitioners' Petition, it is stated that the physical examination of the girls "against their will" is a violation of Title IX. Again on page 10 of their Petition, Petitioners state that the investigation conducted in the ladies' room at the YMCA was "over protest by the girls . . . ." These allegations fly directly in the face of the District Court's opinion that force was not used and was unnecessary since the players themselves wanted to resolve the issue. See District Court Memorandum Opinion and Judgment (Petition for Writ of Certiorari, Appendix A, p. 13a).

On page 2 of the Petition, Petitioners, referring to a meeting subsequently held at the Loneman school, characterized the meeting as "an attempt to cover up and make light of the search conducted at the tournament." Petition for Writ of Certiorari, p. 2. The District Court's Memorandum Opinion states that on January 9, 1996, coach Neugebauer and Athletic Director Anderson met with the Loneman team and their parents and "apologized for their conduct." The District Court went on to note that the January 12, 1996, meeting and healing

ceremony was held to allow YMCA officials to apologize for the incident, referring to Petitioners' own statement of undisputed material facts. See District Court Memorandum Opinion and Judgment (Petition for Writ of Certiorari, Appendix A, pp. 13a-14). The characterization of these events as a "cover up" is not based upon any evidence in this record.

Finally, Petitioners repeatedly assert to this Court that they "were not permitted the opportunity to hold depositions of the parties," Petition for Writ of Certiorari, p. 5; that "no depositions were permitted prior to the decision granting summary judgment," Petition for Writ of Certiorari, p. 7. The fact is, that from the date this action was commenced on December 2, 1997, through the issuance of the District Court's Memorandum Opinion and Judgment on October 29, 1998, Petitioners never requested a single deposition of any person, nor did they seek a continuance of the District Court's consideration of the Motions for Summary Judgment in order to allow depositions to occur.

JURISDICTION

Supreme Court Rule 13(3) provides that if a petition for rehearing is **timely filed** in the lower court, the ninety (90) days to file a petition for writ of certiorari runs from the date of the denial of the petition for rehearing. In Petitioners' Jurisdictional Statement, Petitioners assert that the Petition was filed within ninety (90) days from the denial of the Petition for Rehearing, which statement is accurate, but not complete. In fact, the Petition for

Rehearing was **not timely** filed in the lower court, as required by the Supreme Court Rule.

Petitioners below filed a motion on November 29, 1999, with the Eighth Circuit Court of Appeals requesting an extension of time to file the Petition for Rehearing. This motion was granted on November 30, 1999, extending the time until December 14, 1999. Thereafter, Petitioners' Petition for Rehearing was not timely filed under the extension granted by the Eighth Circuit. On December 22, 1999, Petitioners filed a motion to file the Petition for Rehearing out of time. On January 4, 2000, the Eighth Circuit by Order allowed the "untimely petition for panel rehearing" to be considered by the panel. An alternative request for rehearing *en banc* was denied as untimely. On January 28, 2000, the Petition for Rehearing was denied by the panel. Thus, contrary to this Court's rule, Petitioners' Petition for Rehearing filed with the Eighth Circuit was not timely filed.

Respondent Custer School District is mindful of this Court's decision in the case of Young v. Harper, 520 US 143, 117 SCt 1148, 137 LEd2d 270 (1997), where, in footnote 1 of the opinion, this Court discussed a similar situation. In the Young case, the petition for rehearing in the Tenth Circuit was filed two days late. According to this Court, the Tenth Circuit granted petitioners "leave to file a late petition for rehearing and suggestion for rehearing *en banc* . . . ." This Court also noted that thereafter, the Tenth Circuit treated the petition for rehearing as timely. By way of distinction, here, the Eighth Circuit specifically identified the request as an

"untimely petition." See Jan. 4, 2000, Order (Appendix A, p. 1a). This designation as "untimely" by the Eighth Circuit should bring this Petition within the ambit of this Court's Rule 13(3). Respondent Custer School District submits that Petitioners' Petition for Writ of Certiorari is jurisdictionally defective.

Review of this record reveals that this lack of timely filing is simply one more entry in a long history of dilatory and haphazard prosecution of this case by Petitioners. They have failed to meet the briefing schedule established by the Eighth Circuit, failed to designate the record, failed to follow the rules regarding addendum and appendix. The Eighth Circuit was ultimately forced to file an order directing Petitioners to show cause why the appeal should not be dismissed for failure to prosecute. See Order of February 26, 1999 (Appendix A, p. 2a). In the District Court, sanctions were imposed for Petitioners' failure to follow orders. The principal basis for the District Court's dismissal of Petitioners' action was Petitioners' continuing failure to move the case forward through discovery.

This pattern of behavior should not be tolerated by this Court and should result in denial of Petitioners' Petition for Writ of Certiorari.

SUMMARY OF ARGUMENTS

ARGUMENT I

FedRCivP 56(f) requires that a nonmoving party must make some showing, by affidavit or otherwise, that a continuance is necessary to allow additional discovery in order to establish facts essential to the parties' opposition for summary judgment. In this case, Petitioners made no such showing. The granting of the Motions for Summary Judgment, as affirmed by the Eighth Circuit, was appropriate pursuant to this Rule.

ARGUMENT II

In order to state a claim against Respondent Custer School District, Petitioners must show that someone in a position of authority in the Respondent School District caused discrimination against the minor female Petitioners to occur. In this case, there has been no showing that Respondent Custer School District, as simply another participant in the YMCA girls' basketball tournament, was in a position to establish policy or conduct any kind of search or inspection of participants in an all-girls basketball tournament.

ARGUMENT I

A PARTY FACED WITH A MOTION FOR SUMMARY JUDGMENT MUST MAKE SOME SHOWING THAT ADDITIONAL DISCOVERY IS NECESSARY IN ORDER FOR THE PARTY TO DEVELOP FACTS TO SUPPORT THAT PARTY'S OPPOSITION TO THE MOTION.

Petitioners argue to this Court and argued to the Eighth Circuit that it was an abuse of discretion to grant Respondents' Motions for Summary Judgment because depositions had not been conducted. As noted by the Eighth Circuit Court of Appeals, the District Court granted the summary judgment motion because Petitioners had failed to come forward with evidence tending to prove that the conduct of any Defendant was motivated by race, sex, or age discrimination. The Eighth Circuit determined that Petitioners' attack on the District Court's action was without merit because they did not seek a continuance from the District Court in order to complete additional discovery. This ruling was based upon FedRCivP 56(f), and was a matter of some discussion by the District Court under the heading, "Summary Judgment Standard." The District Court's decision was based upon three modern cases of this Court, setting forth an analytical basis for treating motions for summary judgment. These cases, Anderson v. Liberty Lobby, Inc., 477 US 242, 106 SCt 2505, 91 LEd2d 202 (1986); Cilotex Corp. v. Catrett, 477 US 317, 106 SCt 2548, 91 LE2d 265 (1986); and Matsushita

Elec. Industry Co. v. Zenith Radio Corp., 475 US 574, 106 SCt 1348, 89 LEd2d 538 (1986); establish that it is incumbent upon a nonmoving party to establish significant probative evidence to prevent summary judgment.

In this case, the factual basis for the District Court's determination was taken principally from the Plaintiffs' own Undisputed Material Facts. This includes an undisputed material fact submitted by Petitioners that the girls were taken to a restroom, where some of the girls showed their bra straps and others, who did not wear bras, showed the tops of their panties to confirm they were indeed females. Any girls who did wear bear or parties opened their shirts and shorts to show they were females. In the privacy of the ladies' room in the setting of a single sex athletic event, this is hardly the egregious or shocking action Petitioners claim. Force was not used, and the players themselves wanted to resolve the issue.

Petitioners cannot claim a better state of facts than they themselves have alleged in their Complaints and pleadings. The Petition for Writ of Certiorari should not be granted.

ARGUMENT II

THE LOWER COURT PROPERLY DISMISSED RESPONDENT CUSTER SCHOOL DISTRICT WHERE THERE WAS NO SHOWING THAT ANY PERSON IN A POSITION OF AUTHORITY TOOK ANY ACTION OR INSTITUTED ANY POLICY IMPOSING SEX OR RACIAL DISCRIMINATION.

This Court, in Gebser v. Lago Vista Indep. School Dist., 524 US 274, 118 SCt 1989, 141 LEd2d 277 (1998), held that where a school district is being sued for the actions of one of its employees, under Title IX, the entity will not be held liable unless an official who has the authority to remedy the alleged discriminatory action has actual knowledge and is deliberately indifferent to the conduct. Clearly, principles of *respondeat superior* do not apply. The Custer School District is a public school district within the State of South Dakota, organized under the laws of the State of South Dakota.

The undisputed facts here show that a Custer School District employee, Ms. Neugebauer, was coaching the Custer School District, Loneman School girls' team at the YMCA girls' basketball tournament. As the District Court noted, Ms. Neugebauer was coaching her team in another game when the complained of inspection took place. She had no authority to require YMCA officials or anyone else to conduct any examination of any team member, nor did she have any

policy making authority within the Custer School District. No allegations nor factual showing whatsoever was put forward by Petitioners establishing any effective involvement of any Custer School District official in the events complained of.

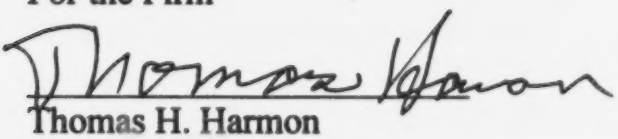
CONCLUSION

The District Court properly dismissed Custer School District from this action, and the Petitioners' Petition for Writ of Certiorari should be denied.

Dated this 30th day of May, 2000.

Respectfully submitted,

TIESZEN LAW OFFICE, LLP
For the Firm



Thomas H. Harmon
306 East Capitol, Suite 300
P.O. Box 550
Pierre, SD 57501-0550
Telephone: (605) 224-1500

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 99-1037SDRC

Tara Davenport, et al.	*	
	*	
Appellants,	*	Appeal from the
	*	United States District
vs.	*	Court for the District
	*	of South Dakota
Young Men's Christian	*	
Association, et al.	*	
	*	
Appellees.	*	

The motion to file an untimely petition for panel rehearing is hereby granted, and the petition shall be considered by the panel. Appellant Tara Davenport's alternative request for rehearing en banc is denied as untimely.

January 4, 2000

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1037SDRC

Tara Davenport, et al.	*	
	*	
Appellants,	*	Appeal from the
	*	United States District
vs.	*	Court for the District
	*	of South Dakota
Young Men's Christian	*	
Association, et al.	*	
	*	
Appellees.	*	

On consideration of appellees' motion to dismiss, appellants are directed to show cause, within fifteen (15) days of the date of this order, why this appeal should not be dismissed for failure to prosecute.

See 8th Cir. R. 3C.

February 26, 1999

Order Entered Under Rule 27B(a):
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit